No. 16-1363

IN THE
Supreme Court of the United States

KIRSTJEN M. NIELSEN,
Secretary of Homeland Security, *et al.*,
Petitioners,

v.

MONY PREAP, *et al.*,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF U.S. REPS. ANDY BIGGS, DAVE BRAT, SCOTT DESJARLAIS, PAUL GOSAR, ANDY HARRIS, JODY HICE, WALTER JONES, STEVE KING, DOUG LAMALFA, AND TED YOHO, AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

Date: June 8, 2018

QUESTIONS PRESENTED

Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into criminal custody immediately.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. SECTION 1226(C) IMPOSES MANDATORY DETENTION ON ALIENS WHO ARE REMOVABLE FOR ANY OF THE REASONS SPECIFIED IN THE STATUTE 10

A. Congress Cut Back on Immigration Officers' Broad Discretion to Detain or Release Criminal Aliens 10

B. Section 1226(c)(1) Directs Immigration Officers to Take Custody of Criminal Aliens as Soon as They Are Released from Criminal Custody 13

C. The Mandatory Nature of Detention Provided for in Section 1226(c) Does not Dissipate if Immigration Officials Delay Taking Criminal Aliens into Custody 15

Page

D. The Aliens "Described" in Section 1226(c)(1)—and Thereby Made Subject to Mandatory Detention—Are Those Specified in Subparagraphs (A) through (D) 20

II. THE LEGISLATIVE HISTORY OF SECTION 1226(C) CONFIRMS THAT CRIMINAL ALIENS DO NOT GAIN EXEMPTION FROM MANDATORY DETENTION IF THEY ARE NOT TAKEN INTO CUSTODY IMMEDIATELY 24

III. THE COURT SHOULD DIRECT DECERTIFICATION OF THE PLAINTIFF CLASSES WHEN THE CASE IS REMANDED FOR CONSIDERATION OF RESPONDENTS' DUE PROCESS CLAIMS 29

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases:

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003) 7, 16
Brock v. Pierce County,
476 U.S. 253 (1986) 17
Demore v. Kim,
538 U.S. 510 (2003). 9, 18, 24, 25, 26, 27
Hosh v. Lucero,
680 F.3d 375 (4th Cir. 2012) 7, 14
In re Rojas,
23 I & N. Dec. 117
(B.I.A. 2001) (*en banc*) 11, 19, 28
INS v. St. Cyr,
533 U.S. 289 (2001) 2
Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 1, 10, 21, 30 31, 32
Rodriguez v. Hayes,
591 F.3d 1105 (9th Cir. 2010), *rev'd on other grounds sub nom., Jennings v. Rodriguez*,
138 S. Ct. 830 (2018) 30
Sylvain v. Attorney General,
714 F.3d 150 (3d Cir. 2013) 7, 13, 18
United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 16
United States v. Montalvo-Murillo,
495 U.S. 711 (1990) 16, 17, 18, 19

Page(s)

Statutes an Constitutional Provisions:

U.S. Const. Amend. V (Due Process Clause) 6

Bail Reform Act of 1984 ..... 16, 17, 18, 19
18 U.S.C. § 3142(f) 16

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208. ..... 2, 9, 27, 29
IIRIRA § 304(b) 2

Immigration and Naturalization Act of 1952 (INA) 2, 28
INA § 212(c) (1995) 2
INA § 242(a)(2) (1995) 28
8 U.S.C. § 1221 - 1231 29
8 U.S.C. § 1226 ..... 9, 11, 29
8 U.S.C. § 1226(a) 5, 6, 11, 12
8 U.S.C. § 1226(c) ..... *passim*
8 U.S.C. § 1226(c)(1) ..... *passim*
8 U.S.C. § 1226(c)(1)(A) - (D) 4, 8, 21, 22
8 U.S.C. § 1226(c)(2) ..... *passim*
8 U.S.C. § 1252(f)(1) 10, 29, 30

Rules and Regulations:

8 C.F.R. § 1236.1(c)(8) 5, 12

Fed. R. Civ. P. 23(a) 31

Fed. R. Civ. P. 23(b)(2) 9

Page(s)

Miscellaneous:

Dependent Clauses: Adverbial, Adjectival, Nominal, TOWSON ONLINE WRITING SUPPORT (*"Dependent Clauses"*), https://webapps.Towson.edu/ows/AdvAdjNomClause.htm (last visited June 8, 2018) 23, 24

Identifying Independent and Dependent Clauses, PURDUE ONLINE WRITING LAB, https://English.purdue.edu/owl/resources/598/1 (last visited June 8, 2018) 23

John Morton, Director, Immigration and Customs Enforcement Agency, *Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011) 19

William Strunk Jr. & E.B. White, THE ELEMENTS OF STYLE (4th ed. 2000) 23

Webster's Third International Dictionary (2002) .. 14

H.R. Conf. Rep. No. 104-828 (1996) 27

S. Rep. No. 104-249 (1996) 27

S. Rep. No. 104-48 (1995) 27

141 Cong. Rec. S7803, S7823 (June 7, 1995) 27

INTERESTS OF *AMICI CURIAE*

The *amici curiae* are ten Members of Congress and a public-interest law firm.[1]

Amici curiae Andy Biggs (Ariz.), Dave Brat (Va.), Scott DesJarlais (Tenn.), Paul Gosar (Ariz.), Andy Harris (Md.), Jody Hice (Ga.), Walter Jones (N.C.), Steve King (Iowa), Doug LaMalfa (Calif.), and Ted Yoho (Fla.) are Members of the U.S. House of Representatives.

The Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF regularly appears in this and other federal courts to support the rule of law in immigration proceedings. *See, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

Amici believe that Congress and the Executive Branch must continue to be afforded broad power to detain, pending completion of removal proceedings, those aliens who have been convicted of serious crimes. Experience has demonstrated that if those aliens are not detained, a large percentage of them will abscond, and a significant majority will commit new crimes before they can be apprehended and their removal proceedings completed.

Congress concluded in 1996 that the immigration laws then in effect granted the Executive

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing.

Branch too much discretion to release criminal aliens facing deportation. Accordingly, it amended immigration law to require detention—pending completion of removal proceedings—of all aliens convicted of serious crimes. *Amici* are concerned that the decision below severely undercuts the mandatory-detention provision. By limiting mandatory detention to those criminal aliens who are taken into federal custody *immediately* following their release from criminal incarceration, the decision below ensures that large numbers of criminals will once again be set free within the general population while their appeals from removal orders are pending. *Amici* do not believe that the immigration laws require that irrational result.

STATEMENT OF THE CASE

Most aliens who are subject to removal proceedings are permitted to live freely in American society while those proceedings are ongoing. Congress has, however, designated one instance in which such aliens "shall" be detained pending completion of those proceedings. In 1996, Congress enacted 8 U.S.C. § 1226(c) to require the detention, pending completion of removal proceedings, of aliens who have been convicted of certain serious crimes specified in the statute. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208.[2]

---

[2] Congress, in IIRIRA and related legislation, further provided that removal is absolutely mandatory for aliens convicted of particularly serious crimes. IIRIRA eliminated the Secretary's discretion to waive deportation for such aliens. IIRIRA § 304(b) (repealing § 212(c) of the Immigration and Naturalization Act of 1952 (INA)). *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001).

Federal immigration officials detained three of the Respondents (the "Preap Respondents") in California pursuant to § 1226(c), pending completion of removal proceedings. The other three Respondents (the "Khoury Respondents") were similarly detained in the State of Washington. Each of the Respondents had been convicted of one or more serious crimes, and each concedes (at least for purposes of this case) that his criminal record rendered him removable as well as subject to mandatory detention under § 1226(c). However, the Immigration and Customs Enforcement Agency (ICE) allowed some time to elapse following Respondents' release from criminal custody (periods ranging from several months to 11 years) before initiating removal proceedings and taking them into custody.

Respondents contend that § 1226(c)'s mandatory detention provisions do not apply to them because they were not detained immediately following their release from imprisonment for one of the offenses listed in § 1226(c). In other words, they admit that ICE could have subjected them to mandatory detention if it had acted more diligently but that § 1226(c) detention was no longer permissible once ICE delayed in taking them into custody. Instead, Respondents argue, they are entitled to a bond hearing and to release from custody in the absence of evidence that they are flight risks or a danger to public safety.

Federal district courts in Oakland and Seattle agreed with those arguments. The Oakland court granted a preliminary injunction to the Preap Respondents and a class of similarly situated criminal aliens, finding that the Government violates "the plain

language of Section 1226(c)" by subjecting to mandatory detention those aliens who have committed an offense enumerated in § 1226(c) but who were not apprehended at the time they were released from criminal custody. Pet. App. 60a-106a. The Seattle court issued the following declaratory judgment in favor of the Khoury Respondents and a class of similarly situated criminal aliens: "The government may not subject an alien to mandatory detention via 8 U.S.C. § 1226(c) unless the government took the alien into custody immediately upon his release from custody for an offense described in subparagraphs (1)(A) through (1)(D) of § 1226(c)." *Id.* at 137a.

In a published opinion, the Ninth Circuit affirmed the preliminary injunction awarded to the Preap Respondents. Pet. App. 1a-28a. The appeals court recognized that its interpretation of § 1226(c) conflicts with the interpretation of every other federal appeals court that has issued an opinion addressing the issue—the Second, Third, Fourth, and Tenth Circuits. *Id.* at 4a-5a. Relying on its *Preap* decision, the court issued a brief unpublished Memorandum affirming the Seattle court's judgment that granted class certification and declaratory judgment to the Khoury Respondents. *Id.* at 58a-59a.

The Ninth Circuit noted that § 1226(c)(1) states that "any alien" who is inadmissible or deportable by virtue of having committed certain enumerated crimes "shall" be taken into custody by immigration officials "when the alien is released ..." The appeals court held, "The statute unambiguously imposes mandatory detention without bond only on those aliens taken by the AG into immigration custody 'when [they are]

released' from criminal custody." Pet. App. 5a-6a. It concluded that "Congress's use of the word 'when' conveys immediacy" and that the statute deprives immigration officials of mandatory-detention authority if they fail to detain criminal aliens "promptly upon the aliens' release from criminal custody." *Id.* at 6a.

The appeals court described § 1226(c) as a "limited exception" to 8 U.S.C. § 1226(a), which grants immigration authorities discretion *either* to continue to detain an alien arrested as potentially removable *or* to release the alien on bond. *Id.* at 10a.[3] The court noted that the Government, pursuant to its § 1226(a) discretionary release authority, has issued regulations granting detained aliens a right to a bond hearing and providing that an alien may be released if he is found to be neither a danger to the community nor a flight risk. *Id.* (citing 8 C.F.R. § 1236.1(c)(8)).

In support of its interpretation of the mandatory detention statute, the Ninth Circuit cited language in § 1226(c)(2)—a provision that prohibits the Government (except in circumstances inapplicable here) from releasing "an alien described in paragraph (1)." The court concluded that the aliens "described in paragraph (1)" include only those aliens who are taken into immigration custody immediately following their release from criminal custody. Pet. App. 13a-19a.

Finally, the appeals court rejected the

---

[3] Sections 1226(a) and 1226(c) reference the detention authority of "the Attorney General," but that authority is now shared by the Secretary of Homeland Security and her designate, ICE.

Government's argument that "even if § 1226(c)(1) requires prompt detention, we should nonetheless uphold the AG's authority to detain without bond an alien who committed a covered offense even when the AG has violated the mandate of § 1226(c)(1)." *Id.* at 23a. The Government's argument relied on Court decisions holding that statutes stating that the Government "shall" act within a specified time should not be construed, without more, as stripping the Government of authority to act at a later time. *Id.* The Ninth Circuit held that this line of cases was inapplicable because its interpretation of § 1226(c) did not deprive immigration officials of all authority to detain criminal aliens who are not taken into custody in a timely manner; rather, its interpretation simply requires that detention decisions be governed by § 1226(a) rather than § 1226(c). *Id.* at 25a-26a.

Respondents also asserted that the Government's denial of bond hearings violated their Fifth Amendment rights to due process of law. Both the district courts and the Ninth Circuit ruled in Respondents' favor without addressing the due process issue.

SUMMARY OF ARGUMENT

The Ninth Circuit's construction of § 1226(c) is inconsistent with the language, structure, purpose, and history of that statute. The only plausible interpretation of the statute is that it eliminates the discretion that immigration officials previously possessed to release on bond (pending completion of removal proceedings) those aliens convicted of particularly serious crimes. Congress directed that

aliens subject to mandatory detention should be taken into custody just as soon as they are released from criminal custody. But nothing in the statute suggests that Congress intended to "reward" immigration officials by restoring their discretionary release authority in those instances in which officials fail to immediately detain the criminal aliens.

Paragraph 1226(c)(1) states that immigration officials "shall" take criminal aliens into custody "when the alien is released" from criminal custody. As the Fourth Circuit has recognized, the "when ... released" language "connotes some degree of immediacy," *Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012)—Congress certainly was not suggesting that immigration officials were free to act at their leisure. But the statute includes no language suggesting that the obligation to take a criminal alien into custody dissipates once immigration officials have failed to take custody as soon as he is released from criminal custody.

Indeed, this Court has repeatedly held that federal statutes stating that the Executive Branch "shall" take action by a specified date should not be interpreted as a prohibition against taking that action after the specified date. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 161 (2003). The Third Circuit rejected the interpretation of § 1226(c)'s "when ... released" language adopted by the courts below, explaining, "Congress imposes deadlines on other branches of government to prod them into ensuring the timely completion of their statutory obligations to the public, not to allow those branches to avoid their obligations just by dragging their feet." *Sylvain v. Attorney General*, 714 F.3d 150, 158 (3d Cir. 2013)

(citations omitted).

There is no plausible argument that Congress inserted the "when ... released" language for the benefit of criminal aliens; to the contrary, they benefit when ICE *delays* in taking them into ICE custody following their release from criminal custody. Congress adopted language connoting a need for immediate action because it believed that the public interest would be well served if criminal aliens were kept off the streets throughout the period during which their removal proceedings were pending. That public interest is furthered even when ICE officials neglect to take immediate action and take a criminal alien into custody only after he has regained his freedom.

The Ninth Circuit's reliance on § 1226(c)(2)'s "alien described in paragraph (1)" language is misplaced. The only language in § 1226(c)(1) that "describes" an alien is the language set out in subparagraphs (A) through (D)—the provisions that identify the categories of aliens who are eligible for § 1226(c) detention. Paragraph (1)'s "when ... released" language does not "describe" an alien; rather, it addresses the timing of the Attorney General's decision to take an identified alien into custody; *e.g.*, the Attorney General is not to take the alien into custody *before* he has been released from criminal custody. That understanding of the word "described" is dictated by the structure and history of § 1226(c) as well as by well-accepted rules of English grammar. The phrase "when the alien is released" is an adverbial phrase that cannot modify a noun (*i.e.* the noun "alien" in the opening clause of paragraph (1)) and thus cannot be said to "describe" an alien within the meaning of

§ 1226(c)(2).

Section 1226(c)'s legislative history strongly supports the Government's position that the statute's mandatory-detention requirement remains in force even if ICE fails to take custody of a criminal alien immediately after his release from criminal custody. As the Court recognized in *Demore v. Kim*, 538 U.S. 510, 519 (2003), Congress adopted § 1226(c) in light of "evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during deportation proceedings." IIRIRA included a mandatory-detention provision because Congress wanted to prevent "deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528. Congress's concern was with expediting the removal of *all* aliens who committed serious crimes, not simply the removal of those criminal aliens who are taken into custody immediately.

Respondents also raise a due-process challenge to the Government's refusal to provide them with bond hearings. The lower courts declined to reach that issue because they interpreted § 1226 as requiring the provision of bond hearings to Respondents. The Court should reverse that statutory ruling and then remand the case to permit the lower courts to address the due process claims in the first instance. As it did in *Jennings*, the Court should direct the lower courts on remand to reconsider their Rule 23(b)(2) class-certification orders. Congress has eliminated the jurisdiction of federal courts to hear challenges to the

operation of § 1226(c) on a class-wide basis. 8 U.S.C. § 1252(f)(1). If one of the Respondents can demonstrate on an individualized basis that his detention without access to a bond hearing violates his due-process rights, federal courts possess jurisdiction to grant appropriate relief. But particularly because a due-process claim is plaintiff-specific and "calls for such procedural protections as the particular situation demands," the lower courts lack both jurisdiction and a plausible rationale for continuing to hear the claims of Respondents and similarly situated criminal aliens on a class-wide basis. *Jennings*, 138 S. Ct. at 851-52.

ARGUMENT

I. SECTION 1226(C) IMPOSES MANDATORY DETENTION ON ALIENS WHO ARE REMOVABLE FOR ANY OF THE REASONS SPECIFIED IN THE STATUTE

A. Congress Cut Back on Immigration Officers' Broad Discretion to Detain or Release Criminal Aliens

Prior to the mid-1980s, immigration law granted Executive Branch officials very broad discretion over whether to hold aliens in custody pending completion of deportation proceedings. Starting in 1988, Congress passed a series of laws cutting back on that discretion and mandating that certain categories of criminal aliens were not to be released from custody during the pendency of deportation proceedings. Congress's apparent purpose was to ensure that criminal aliens could be located on the day appointed for their deportation. *See In re Rojas*, 23 I. & N. Dec. 117, 121-

24 (B.I.A. 2001) (*en banc*).

That effort culminated in the adoption of 8 U.S.C. § 1226(c) as part of IIRIRA; it mandates arrest and detention throughout removal proceedings of large numbers of criminal and terrorist aliens who are either deportable or inadmissible under specified sections of the immigration laws. As the Court explained in *Jennings*:

> Section 1226 generally governs the process of arresting and detaining [inadmissible aliens or aliens convicted of criminal offenses] pending their removal. ... Section 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien "pending a decision on whether the alien is to be removed from the United States." § 1226(a). "Except as provided in subsection (c) of this section," the Attorney General "may release" an alien detained under § 1226(a) "on bond ... or conditional parole." *Ibid.* Section 1226(c), however, carves out a statutory category of aliens who may *not* be released under § 1226(a).

138 S. Ct. at 837.

The Ninth Circuit interpreted § 1226(c) as the grant of a new, special authority to detain aliens. Pet. App. 15a (characterizing § 1226(c) as a "limited exception" to § 1226(a) that grants immigration officials new detention authority not previously

available). As the history of immigration law described above makes clear, the Ninth Circuit had it exactly backward. Prior to 1996, immigration officials possessed broad authority to take deportable aliens into custody, as well as broad discretion (subject to judicial review for abuse of discretion) to determine whether to continue the detention or to release the aliens on bond. Far from granting immigration officials new powers, § 1226(c) cut back on their powers by curtailing their release authority. Section 1226(c) states that the Attorney General "shall" take specified aliens into custody and expressly prohibits their release prior to removal except in circumstances inapplicable here.

The Ninth Circuit's ruling effectively grants immigration officials the power to nullify § 1226(c) and reclaim for themselves their previous discretionary authority to detain or release criminal aliens. According to the appeals court, if immigration officials delay only slightly and take a criminal alien into custody sometime after his release from criminal custody, release procedures become subject to § 1226(a)—the statute that historically has accorded them broad discretion in deciding whether to release the alien.[4] It is not plausible that Congress intended to permit its new limitations on Executive Branch

---

[4] ICE regulations provide that immigration officials generally will exercise their § 1226(a) release authority upon a determination that the alien does not pose a danger to persons or property and is likely to appear for any future proceeding. 8 C.F.R. § 1236.1(c)(8). Congress has not directed adoption of those release criteria; it has granted immigration officials very broad discretion in determining § 1226(a) release criteria.

authority to be so easily sidestepped. Although § 1226(c) directs Executive Branch officials to act quickly, such directives are designed to "prod [other branches of government] into ensuring the timely completion of their statutory obligations to the public, not to allow those branches to avoid their obligations just by dragging their feet." *Sylvain*, 714 F.3d at 158.

B. Section 1226(c)(1) Directs Immigration Officers to Take Custody of Criminal Aliens as Soon as They Are Released from Criminal Custody

Section 1226(c) is divided into two paragraphs. Paragraph 1 (that is, § 1226(c)(1)) imposes on immigration officials an obligation to take into custody the criminal and terrorist aliens specified therein. Paragraph 2 addresses the release of those detained pursuant to Paragraph 1; it states that release is permissible "only" under circumstances inapplicable to this case.

Section 1226(c)(1) states, "The Attorney General shall take into custody any alien who [is inadmissible or deportable by reason of having committed one of several enumerated offenses] when the alien is released..." The parties dispute the meaning of the phrase "when the alien is released..."[5]

---

[5] Several aspects of the phrase's meaning are not disputed. Although § 1226(c)(1) does not elaborate on the meaning of the word "released," all parties agree that it refers to release from a custodial sentence imposed for violating one of the enumerated offenses. They also agree that the Attorney General's obligation to

The phrase "when the alien is released" modifies the verb phrase "take into custody." Respondents contend (and the Ninth Circuit agreed) that "when the alien is released" specifies that immigration officials are only permitted to undertake their § 1226(c)(1) take-into-custody obligations at *the precise time* that the alien is released from criminal custody. Pet. App. 19a-27a.

Conversely, the United States contends that the word "when" has multiple meanings and does not necessarily connote a need for immediate action:

> Th[e "when ... released"] clause standing alone could be read to mean either "at or during the time that" ("while") the alien is released, or "just after the moment that" he is released.

Pet. Br. 17 (quoting *Webster's Third New International Dictionary* 2602 (2002)).

Amici agree with the Fourth Circuit that § 1226(c)(1)'s "when ... released" language "connotes some degree of immediacy." *Hosh*, 680 F.3d at 381. Congress adopted § 1226(c) because it sought to light a fire under immigration officials, whom it deemed to have taken insufficient steps to remove criminal aliens from the Nation. The statute states that the Attorney General "shall" take specified criminal aliens into custody "when the alien is released." That language does not suggest that immigration officials are free to

---

take custody does not arise while the criminal alien is still serving his custodial sentence.

act at their leisure.[6]

Importantly, however, nothing in the statute suggests that the statutory obligation to take the specified aliens into custody dissipates once immigration officials have failed to take custody as soon as the aliens are released from criminal custody. As noted above, the statute does not confer new arrest powers on immigration officials. Rather, the statute imposes on the Attorney General *obligations* that should be undertaken in a timely manner but says nothing to suggest that the obligations are time-limited.

C. The Mandatory Nature of Detention Provided for in Section 1226(c) Does not Dissipate if Immigration Officials Delay Taking Criminal Aliens into Custody

Although § 1226(c)(1)'s "when ... released" provision connotes a mandate that immigration authorities proceed expeditiously in detaining criminal aliens following their release from criminal custody,

---

[6] The final clauses of § 1226(c)(1) reinforce the understanding that Congress expected the Attorney General to Act just as soon as the criminal alien is released from prison-style custody. Immediately following the "when the alien is released" language, the statute provides that the obligation to take the criminal alien into custody exists "without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." In other words, Congress declared that it would brook no excuses for delay by immigration officials in taking criminal aliens into custody.

the statute does not state that the Attorney General may take custody under § 1226(c)(1) *only* at the precise moment of release. But even if the statute could plausibly be construed as imposing an immediate-custody requirement, a criminal alien who is not detained until after his release does not thereby become exempt from mandatory detention. As this Court explained in *Barnhart*, "a statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done." *Barnhart*, 537 U.S. at 161. In general, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (citations omitted).

The Court's decision in *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), is directly on point and requires a finding that § 1226(c)'s detention mandate does not dissipate simply because immigration officials delay in carrying out the mandate. In *Montalvo-Murillo*, a criminal suspect sought and obtained pre-trial release because judicial officers failed to comply with time limitations imposed by the Bail Reform Act of 1984.[7] The Court reversed,

---

[7] The Act states that a pretrial detention hearing "shall be held immediately upon the [criminal suspect's] first appearance before the judicial officer" and permits a continuance of the hearing of no more than five days. 18 U.S.C. § 3142(f). The suspect's hearing did not occur until 11 days after his first appearance, and the Government made no showing of good cause for the delay. The district court held that although the

holding that the Government's failure to conduct a detention hearing within the time frame imposed by the Act did not preclude it from detaining the suspect in advance of trial. 495 U.S. at 717.

The Court explained:

> There is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent. ... "We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake."

Id. at 717-18 (quoting *Brock v. Pierce County*, 476 U.S. 253, 260 (1986)).

The Ninth Circuit sought to distinguish *Montalvo-Murillo*, noting that, unlike the lower-court decisions in that case, its decision does not altogether preclude the Government from detaining individuals if ICE fails to comply with statutory time limits. If immigration officials delay in taking custody of a

---

Government demonstrated that no conditions of release could reasonably assure either the suspect's appearance at trial or public safety (findings that ordinarily would mandate pretrial detention), the Government's failure to comply with the statutory time limit for conducting a detention hearing precluded the suspect's continued detention. 495 U.S. at 714-16.

criminal alien, they can still detain him throughout removal proceedings if an immigration judge determines at a bail hearing that the alien is either a flight risk or a danger to the public. Pet. App. 26a.

That purported distinction between this case and *Montalvo-Murillo* is not meaningful; in both cases, the detention rules sought to be imposed by the lower courts were not the ones adopted by Congress. When it enacted § 1226(c), Congress determined that aliens subject to removal for criminal activity should be detained throughout the removal process. As *Demore* and *Sylvain* explained, Congress determined that their criminal backgrounds should serve as a proxy for flight risk and danger to the public. *Demore*, 53 U.S. at 528; *Sylvain*, 714 F.3d at 160. *Montalvo-Murillo* is not distinguishable simply because the alternative detention rules imposed by the Ninth Circuit arguably thwart the congressional mandate to a lesser degree than did the lower court decisions in *Montalvo-Murillo*.

Indeed, the argument for interpreting a statute's timely-government-action requirement as a prohibition against tardy government action is far weaker here than it was in *Montalvo-Murillo*. The Bail Reform Act's timely-detention-hearing requirement was adopted at least in part for the benefit of criminal suspects, who have a strong interest in a timely hearing that may result in an early release.

In contrast, no one seriously contends that Congress adopted the § 1226(c) detention mandate for the benefit of criminal aliens. To the contrary, criminal aliens only stand to benefit when ICE delays in taking them into custody following their release

from criminal detention; they would be quite happy if ICE forgot about them indefinitely. *Montalvo-Murillo* observed that "there is no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants every time some deviation from the strictures of [the Bail Reform Act] occurs." 495 U.S. at 720. That admonition against bestowing a "windfall" on detainees is doubly applicable here, where the alleged untimeliness of government action has only served to benefit criminal aliens facing removal proceedings.

Congress adopted § 1226(c) because of its interest in detaining and removing *all* criminal aliens, not simply those aliens who come into ICE custody at the time they are released from criminal custody. *Rojas*, 23 I. & N. Dec. at 122.[8] It would be inconsistent with that goal to interpret § 1226(c)'s detention mandate as inapplicable to criminal aliens who, for whatever reason, are not detained at the precise moment they are released from criminal custody.

---

[8] Indeed, all recent Administrations have made the detention and removal of criminal aliens their highest immigration enforcement priority. For example, during the Obama Administration, a 2011 memorandum from the director of ICE stated that the agency's first priority was "[a]liens who pose ... a risk to public safety" and directed the agency to use "detention resources" for "aliens subject to detention by law." John Morton, Director, Immigration and Customs Enforcement Agency, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* at 1, 3 (March 2, 2011).

D. The Aliens "Described" in Section 1226(c)(1)—and Thereby Made Subject to Mandatory Detention—Are Those Specified in Subparagraphs (A) through (D)

In concluding that § 1226(c) is inapplicable to criminal aliens who are not taken into ICE custody immediately following their release from criminal custody, the Ninth Circuit relied heavily on the first clause of § 1226(c)(2): "The Attorney General may release an alien described in [§ 1226(c)(1)] only if ..." The Ninth Circuit held that the only aliens "described" in § 1226(c)(1) are those who have committed one of the predicate crimes *and* who were taken into ICE custody when they were released from criminal detention. Pet. App. 13a-19a. Because Respondents and similarly situated criminal aliens (none of whom were taken into custody until some time after their release from criminal detention) are not "described" in § 1226(c)(1), they are not subject to § 1226(c)(2)'s no-release mandate, the Ninth Circuit held. *Ibid.*

The appeals court's reliance on the "alien described" language is misplaced because the clause within § 1226(c)(1) on which the court focuses—"when the alien is released"—is not descriptive of anyone. Instead, it is an adverbial clause that tells immigration officials *when* they are to take custody of certain aliens: they are to "take into custody any alien [who is removable or inadmissible by reason of having committed specified offenses] when the alien is released." 8 U.S.C. § 1226(c)(1). Indeed, the statute's reference to "the" alien is an indication that those who are to be taken into custody expeditiously have been

fully described elsewhere. There is little doubt which aliens are "described" in the statute; §§ 1226(c)(1)(A) - (D) identify the categories of aliens who are eligible for § 1226(c) mandatory detention and "shall" be taken into custody.

Any doubt on that score is eliminated by the structure of the statute. Section 1226(c)(1) begins by stating, "The Attorney General shall take into custody any alien who— ..." and then is followed by the four indented subparagraphs ((A) through (D)) that state precisely "who" the aliens are that are to be taken into custody. Indeed, *dicta* in *Jennings* stated (without challenge from dissenting justices) that those subject to mandatory detention under § 1226(c)(2) include *all* aliens described in subparagraphs (A) through (D), without reference to how quickly they were taken into ICE custody:

> Section 1226(c) ... states that the Attorney General "shall take into custody any alien" who falls into one of the enumerated categories involving criminal offenses and terrorist activities. 8 U.S.C. § 1226(c)(1). Section 1226(c) then goes on to specify that the Attorney General "may release" one of those aliens *"only if* the Attorney General decides" both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger of flight risk. § 1226(c)(2) (emphasis added).

Jennings, 138 S. Ct. at 846.

The final clauses of § 1226(c)(1) reinforce the conclusion that the "when the alien is released" clause was not intended to restrict the universe of criminal aliens subject to mandatory detention under § 1226(c)(2). As described in more detail in Footnote 6 above, those concluding clauses (which appear immediately following the "when the alien is released" clause) emphasize that the Attorney General's duty to take criminal aliens into custody is not affected by the character of the alien's release from criminal detention or the possibility that he may be rearrested on criminal charges. In other words, all of the clauses that follow subparagraphs (A) through (D) in § 1226(c)(1)—including the "when the alien is released" clause—focus on the timing of the arrest of aliens, as opposed to describing *which* aliens are subject to § 1226(c) mandatory detention.

Had Congress intended to limit the aliens "described" in § 1226(c)(1) to those taken into ICE custody immediately following their release from criminal incarceration, it likely would have drafted legislation along the following lines: "The Attorney General shall take into custody any alien who is scheduled to be released from criminal incarceration and who is removable or inadmissible by reason of having committed one of the following specified offenses." In contrast, in the statute as actually written, the phrase "when the alien is released" modifies the verb phrase "shall take into custody," not the noun "alien"—and thus does not impose additional limits on the number of criminal aliens otherwise subject to mandatory detention.

The Government's understanding of which aliens

are "described" in § 1226(c)(1) is also supported by well-accepted rules of English grammar. As a grammatical construction, the phrase "when the alien is released" is a dependent adverbial clause.[9] The appearance of the word "when" at the beginning of the clause is the cue that identifies the dependent clause as adverbial; an adverbial clause describes a verb in a sentence's main clause and answers the questions *when, why, where, how,* or *to what degree. Dependent Clauses: Adverbial, Adjectival, Nominal,* TOWSON ONLINE WRITING SUPPORT ("*Dependent Clauses*"), https://webapps.towson.edu/ows/AdvAdjNomClause.htm (last visited June 8, 2018).[10]

The verb in question is "take into custody." It is the verb in the "main clause" on which "when the alien is released" is dependent. Accordingly, under well-accepted rules of grammar, "when the alien is released" modifies the verb phrase "take into custody" and describes the time frame when the Attorney General's obligation to act arises. "When the alien is released," as a dependent *adverbial* phrase, cannot modify either of the nouns in the main clause ("Attorney General" and "alien") and thus cannot be said to "describe" the

---

[9] A clause is "dependent" when (as here) it cannot be a complete sentence; it contains both a subject and a verb but does not express a complete thought. *Identifying Independent and Dependent Clauses*, PURDUE ONLINE WRITING LAB, https://owl.english.purdue.edu/owl/resource/598/1 (last visited June 8, 2018).

[10] To refer to a dependent clause as "adverbial" means that it serves as an adverb—it modifies a verb, an adjective, or another adverb. William Strunk Jr. & E.B. White, THE ELEMENTS OF STYLE 89 (4th ed. 2000).

aliens subject to mandatory detention.[11]

In sum, because § 1226(c)(1) does not "describe" any aliens based on the dates on which they were released from criminal incarceration and taken into custody by immigration officials, § 1226(c)(2)'s reference to "the aliens described in [§ 1226(c)(1)]" does not limit its do-not-release mandate to those criminal aliens taken into custody immediately following their release from criminal incarceration.

II. THE LEGISLATIVE HISTORY OF SECTION 1226(C) CONFIRMS THAT CRIMINAL ALIENS DO NOT GAIN EXEMPTION FROM MANDATORY DETENTION IF THEY ARE NOT TAKEN INTO CUSTODY IMMEDIATELY

The Court's decision in *Demore* includes a lengthy discussion of the legislative history that led to adoption of § 1226(c) in 1996. That history confirms that Congress did not intend to make the mandatory detention of a criminal alien dependent on his being taken into ICE custody immediately following his release from criminal detention.

As *Demore* recognized, "Congress adopted [§ 1226(c)] against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518. Despite those increases, "Congress's investigations showed ...

---

[11] A dependent clause could modify a noun, such as the word "alien" in the main clause, only if it were adjectival in nature. Dependent adjectival clauses are typically begun by the relative pronoun "who." *See Dependent Clauses*, *supra*.

that the INS could not even *identify* most deportable aliens, much less locate them and remove them from the country." *Id.* (emphasis in original). Among the costs identified by Congress of failing to deport criminal aliens in a timely manner was that

> deportable criminal aliens who remain in the United States often committed more crimes before being removed. One 1986 study showed that, after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began.

Id. (citations omitted).

Congress was also responding to "evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings." *Id.* at 519. While improved flight-risk screening at bond hearings arguably could have reduced the large numbers of deportable criminal aliens failing to appear at their removal hearings, studies available to Congress "strongly support[ed] Congress' concern that, even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight." *Id.* at 520. Studies presented to Congress "suggested that detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from this country." *Id.* at 521.

Congress adopted § 1226(c) in response to that evidence. *Demore* rejected a due-process challenge to § 1226(c)'s mandatory detention provisions filed by a criminal alien who claimed that Congress had insufficient evidence to support its conclusion that improved bond-hearing screening would be inadequate to reduce recidivism and flight by those released pending completion of removal proceedings. *Id.* at 528.[12] The Court held that Congress acted constitutionally when it instituted mandatory detention in response to the evidence cited above:

> Congress had before it evidence that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable aliens skipping their hearings and remaining at large in the United States unlawfully. ... The evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action.

Id.

---

[12] The inadequacy of bond-hearing screening is borne out by the facts of this case. Alvin Rodriguez Moya, one of the Khoury Respondents, was granted a bond hearing pursuant to Ninth Circuit orders, and he was released from custody pending completion of removal proceedings, after an immigration judge's determination that he was neither a flight risk nor a threat to public safety. Pet. App. 109a. Moya was later rearrested on murder charges, and a jury in 2017 found him guilty of the attempted first degree murder of his ex-girlfriend and the first-degree murder of her new boyfriend. *See* Pet. Br. at 7 n.3.

Totally absent from the legislative history surveyed by *Demore* is any indication that Congress sought to limit § 1226(c) mandatory detention to those criminal aliens whom immigration authorities took into custody immediately following their release from criminal detention. To the contrary, that history demonstrates Congress's focus on expediting the removal of *all* criminal aliens, not simply of those who were never set free following completion of their criminal sentences.[13] The Ninth Circuit's decision ascribes a meaning to § 1226(c) completely at odds with that broader congressional focus.

Moreover, a series of federal statutes adopted in the years preceding 1996 mandated detention-pending-removal for specified categories of criminal aliens, and those statutes made clear that the detention mandate applied without regard to the date on which the criminal alien was taken into custody by immigration

---

[13] Numerous statements in House and Senate reports issued in connection with the adoption of IIRIRA and § 1226(c) confirm *Demore*'s understanding of Congress's rationale for adopting the legislation. *See, e.g.*, S. Rep. No. 104-48, at 1-3, 23, 31-32 (1995) (recommending enhanced detention-pending-removal requirements as an effective means of expediting removal of criminal aliens); S. Rep. No. 104-249, at 2 (1996) (stating that the purpose of IIRIRA was "the removal of excludable and deportable aliens, especially criminal aliens"); H.R. Conf. Rep. No. 104-828, at 210-11 (1996) (stating that § 1226(c) "provides that the Attorney General *must* detain an alien who is inadmissible ... or deportable under" specified sections of the INA) (emphasis added). *See also* 141 Cong. Rec. S7803, S7823 (June 7, 1995) (statement of Sen. Abraham) (supporting mandatory detention of *all* criminal aliens as necessary to ensure their presence at removal proceedings).

officials.[14] In light of those previous statutes, it is highly unlikely that Congress intended to switch gears in 1996 and adopt a mandatory-detention statute that applied only to criminal aliens who were taken into custody immediately following their release from criminal detention.

---

[14] For example, as amended by Congress in 1991, § 242(a)(2) of the INA, provided as follows:

> (A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) but subject to subparagraph (B), the Attorney General shall not release such felon from custody.
>
> (B) The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

That language has only one plausible interpretation: an alien who has committed an aggravated felony is categorically ineligible for release on bond, without regard to the timing of his detention, if he has not been lawfully admitted into the United States. *See also*, *Rojas*, 23 I. & N. Dec. at 122-124.

III. THE COURT SHOULD DIRECT DECERTIFICATION OF THE PLAINTIFF CLASSES WHEN THE CASE IS REMANDED FOR CONSIDERATION OF RESPONDENTS' DUE PROCESS CLAIMS

Congress has significantly restricted the jurisdiction of federal courts over immigration matters. In awarding injunctive relief on a class-wide basis against federal immigration officials, the lower courts may well have exceeded their jurisdiction. On any remand from this Court for consideration of constitutional issues not yet addressed by the courts below, the Court should direct decertification of the plaintiff classes.

A jurisdiction-limiting provision of IIRIRA, 8 U.S.C. § 1252(f)(1), entitled "Limits on Injunctive Relief," states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no Court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operations of [8 U.S.C. § 1221-1231], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

The last clause of § 1252(f)(1) prohibited the Ninth Circuit from issuing class-wide injunctive relief with respect to detentions under § 1226. That clause limited the Ninth Circuit to issuing injunctions *only*

with respect to the detention of "an individual alien against whom proceedings under such part have been initiated." Section 1252(f) thus barred the class-wide relief granted by the lower courts.

The Ninth Circuit may have concluded, as it did in *Jennings*, that while § 1252(f) bars a class-wide injunction against enforcement of § 1226(c) (if, *e.g.*, § 1226(c) were deemed unconstitutional), it did not bar courts from enjoining, on a class-wide basis, conduct "not authorized by the statute." *Rodriguez v. Hayes*, 591 F.3d 1105, 1120-21 (9th Cir. 2010), *rev'd on other grounds sub nom., Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

Amici disagree that § 1252(f) can be read in so limited a fashion. But even if the statute does not withdraw federal court jurisdiction to issue class-wide injunctive relief against immigration officials alleged to be violating the terms of § 1226(c), it indisputably bars class-wide injunctive relief against immigration officials alleged to be violating the constitutional rights of criminal aliens being detained pursuant to § 1226(c).

That distinction comes into play if the Court reverses the judgment below and then remands for consideration of Respondents' due-process claims, which have not yet been addressed by the courts below. In any such remand, the Court should direct the lower courts—as it did in its *Jennings* remand—to consider decertifying the plaintiff classes with respect to Respondents' claim that mandatory detention under § 1226(c) violates their due process rights.

Jennings stated that even if the Ninth Circuit

had correctly reasoned that § 1252(f)(1) authorized the exercise of jurisdiction over class-wide challenges to the Government's assertion that § 1226(c) permitted prolonged detention of criminal aliens without providing bond hearings, that "reasoning does not seem to apply to an order granting relief on constitutional grounds, and therefore the Court of Appeals should consider on remand whether it may issue classwide injunctive relief based on respondents' constitutional claims." 138 S. Ct. at 851.

Jennings also calls into question whether Respondents can satisfy the requirements for class certification established by Rule 23(a), which requires plaintiffs to demonstrate the existence of issues of law or fact common to the class. *Id.* at 852. *Jennings* questioned whether criminal aliens challenging their mandatory § 1226(c) detention on due-process grounds could meet the commonality requirement given the inherently individualized nature of due-process claims. *Ibid.*

That rationale for decertifying the classes seems particularly apt here; the due-process claim of each of the Respondents likely depends for its success on highly individualized facts. Respondents argue that due process bars the Government from taking them into custody for long-ago criminal convictions, for which they served their sentences and then re-established their ties to American society. The strength of any such claim likely depends on the number of years the alien has lived freely in the United States following completion of his criminal sentence. Obviously, a criminal alien who completed his sentence 20 years ago has stronger due-process claims than a

criminal alien who was taken into ICE custody within a matter of months of his release from criminal detention. *Jennings* strongly suggests that due-process claims of the sort at issue here are inappropriate for consideration on a class-wide basis in light of the individualized nature of the issues raised by such claims.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
Washington Legal Found.
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

June 8, 2018